RECORD AND BRIEFS

FILED
SEP 22 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-980

IN THE
Supreme Court of the United States

JOHN HUSTED, OHIO SECRETARY OF STATE,
Petitioner,
v.
A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS OHIO, AARP, AFL-CIO, SEIU, DEMOCRACY INITIATIVE, NATIONAL COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND MIAMI VALLEY VOTER PROTECTION COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. SMITH
Counsel of Record
DANIELLE LANG*
CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org
Counsel for *Amici Curiae*

** Admitted in New York and California; practice limited to U.S. courts and federal agencies.*

Additional counsel listed on inside cover

Mosaic - (301) 927-3800 - Cheverly, MD

WILLIAM ALVARADO RIVERA
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-6400
warivera@aarp.org
dkohrman@aarp.org
Counsel for *Amici Curiae*
AARP and AARP Foundation

RENATA E. B. STRAUSE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 16th Street, NW
Washington, DC 20006
rstrause@aflcio.org
Counsel for *Amicus Curiae*
AFL-CIO

ELLIS JACOBS
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
130 West Second St., Suite 700
East Dayton, OH 45402
(937) 535-4419
ejacobs@ablelaw.org
Counsel for *Amicus Curiae*
Miami Valley Voter Protection Coalition

NICOLE G. BERNER
CLAIRE PRESTEL
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Avenue, NW
Washington, DC 20036
nicole.berner@seiu.org
claire.prestel@seiu.org
Counsel for *Amicus Curiae*
Service Employees International Union

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. MANY VOTERS FACE SUBSTANTIAL OBSTACLES TO THE BALLOT BOX	9
a. Working people and low-income voters navigate substantial obstacles to the ballot box	9
b. Disabled and older voters face substantial obstacles to the ballot box	20
II. OHIO'S REMOVAL PROCEDURE IMPOSES SUBSTANTIAL BURDENS ON REGISTERED VOTERS WITHOUT EVIDENCE OF ANY CHANGE IN ELIGIBILITY STATUS	27
III. INITIATING THE REMOVAL PROCESS BASED ON NON-VOTING UNDERMINES THE NVRA'S EXPRESS PURPOSES AND RAISES CONSTITUTIONAL CONCERNS	32
CONCLUSION	38

TABLE OF AUTHORITIES

	Page
Anderson v. Celebrezze, 460 U.S. 780 (1983)	33, 36
Applewhite v. Commonwealth, No. 330 MD 2012 (Commw. Ct. Pa. Oct. 2, 2012)	25
Arizona v. Inter-Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013)	3
Clark v. Martinez, 543 U.S. 371 (2005)	32, 33
Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014)	15
Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)	29
League of Women Voters v. Newby, 838 F.3d 1 (D.C. Cir. 2016)	35
Mooneyhan v. Husted, Case No. 3:12-cv-379 (S.D. Ohio Nov. 16, 2012) (Decision and Entry Sustaining Plaintiff's Motion for a TRO)	2
NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014)	14, 17
N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C. 2016)	12, 25
Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012)	5
One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016)	15
Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984)	29

TABLE OF AUTHORITIES—Continued

Page

Ray v. Franklin Cnty. Bd. of Elections, Case No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008) (Opinion and Order Granting Plaintiff's Motion for TRO) 2

Reynolds v. Sims, 377 U.S. 533 (1964) 33

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 11

Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) 4, 15

Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) 17

STATUTES, REGULATIONS, AND LEGISLATIVE HISTORY:

42 U.S.C. § 15041 et seq. 2

52 U.S.C. § 20501 33

H.R. Rep. No. 103-9 (1993) 8, 28, 34

S. Rep. No. 103-6 (1993) 28

OTHER AUTHORITIES:

AARP Pub. Pol'y Inst., How the Travel Patterns of Older Adults are Changing (2011) 24

ACLU, Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities (2015) 36

TABLE OF AUTHORITIES—Continued

Page

AFL-CIO, Know Your Rights: State Laws on Employee Time Off to Vote (2016) 11

Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016 27

Anthony Downs, An Economic Theory of Democracy (1957) 19

Anuj Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 Sci. 682 (2012) 31

Ari Berman, Ohio GOP Resurrects Voter Suppression Efforts, The Nation, Dec. 4, 2013 16

Benjamin Highton, *Early Registration and Voter Turnout*, 59 J. Pol. 565 (1997) 17

Brennan Ctr. for Justice, Citizens Without Proof: A Survey of American's Possession of Documentary Proof of Citizenship and Photo Identification (2006) 24

Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2017) 10

Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in May 2004 (2005) 10

TABLE OF AUTHORITIES—Continued

Page

CalTech/MIT Voting Tech. Project, Voting: What Has Changed, What Hasn't, & What Needs Improvement (2012) 33

Charles Stewart III & Stephen Ansolabehere, *Waiting to Vote*, 14 Election L.J. 47 (2013) 17

Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 Soc. Sci. Q. 171 (2001) 35

Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote*, The Atlantic, Jan. 10, 2014..... 18

David A. Graham, *Ohio's 'Golden Week' of Early Voting Is Dead, Again*, The Atlantic, Aug. 23, 2016 10

Econ. Pol'y Inst., Irregular Work Scheduling and Its Consequences (2015) 10

Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 1 (2011)..... 11

John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246 (1993)..... 19

John E. McNulty, Conor M. Dowling & Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 Pol. Analysis 435 (2009) 12

TABLE OF AUTHORITIES—Continued

Page

Joseph Schachter & Sam Shapiro, *Birth Registration Completeness, U.S., 1950*, 67 Pub. Health Reps. 513 (1952) 26

Lawyers' Comm. for Civil Rights Under Law, 2010 Election Protection Report (2010) 34

Lawyers' Comm. for Civil Rights Under Law, 2014 Election Protection Report (2015) 34

Leadership Conference Educ. Fund, The Great Poll Closure (2016) 11

Lisa Schur & Douglas Kruse, Projecting the Number of Eligible Voters with Disabilities in the Nov. 2016 Elections (2016) 21

Lisa Schur, Meera Adya & Douglas Kruse, Research Alliance for Accessible Voting, Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections (2013).... 20, 22

Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 Am. Pol. Q. 74 (1994)..... 35

Mark Jones, Renée Cross & Jim Granato, Univ. of Houston, Hobby School of Pub. Affairs, The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District (2017)..... 16

M.E. Kropf, *Does Early Voting Change the Socio-Economic Composition of the Electorate?*, 4 Poverty & Pub. Pol'y 1 (2012) 19

TABLE OF AUTHORITIES—Continued

Page

Monica Anderson, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Ctr., Mar. 22, 2017 12

Nat'l Ctr. For Educ. Statistics, Assessment of Adult Literacy, A First Look at the Literacy of America's Adults in the 21st Century (2006) 30

Nat'l Educ. Ass'n, Understanding the Gaps: Who Are We Leaving Behind—And How Far (2015) 30

Nat'l Coalition for the Homeless, You Don't Need a Home to Vote," Voting Rights: Registration Manual (2016) 29

Nat'l Conference of State Legislatures, Voter Identification Requirements (2017) 15

New State Voting Laws III: Protecting the Right to Vote in America's Heartland: Hearing Before Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm., 112th Cong. 7 (2012) (Testimony of Carrie L. Davis, Exec. Dir., League of Women Voters of Ohio) 14

Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NPR, July 23, 2015, 3:38 PM 26

TABLE OF AUTHORITIES—Continued

Page

Raymond E. Wolfinger, Benjamin Highton & Megan Mullin, *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 St. Pol. & Pol'y Q. 1 (2005) 17

Ruth Igielnik, *A Political Profile of Disabled Americans*, Pew Research Ctr., Sept. 22, 2016 ..... 22, 23

Sam Shapiro, *Development of Birth Registration and Birth Statistics in the U.S.*, 4 Population Stud. 86 (1950) 25, 26

Stephen Knack, *Election Day Registration: The Second Wave*, 20 Am. Pol. Q. 65 (2001) 35

Stephen Pettigrew, *The Race Gap in Wait Times: Why Minority Precincts are Underserved by Local Election Officials*, 132 Pol. Sci. Q. 527 (forthcoming 2017) 16, 17

Thad E. Hall & R. Michael Alvarez, Information Tech. & Innovation Found., Defining the Barrier to Political Participation for Individuals with Disabilities (2012) 22

Transportation for America, Aging in Place: Stuck Without Options (2011) 24

U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates 12, 13, 19, 23

U.S. Census Bureau, Electorate Profiles: Selected Characteristics of the Citizen, Voting-Age Population (2016) 19

TABLE OF AUTHORITIES—Continued

Page

U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members, by Age and Family Income: Nov. 2016 (2017) 18

U.S. Census Bureau, Table 10. Reasons For Not Voting, By Selected Characteristics: November 2016 (2017) 13

U.S. Census Bureau, The Supplemental Poverty Measure: 2016 (2017) 26

U.S. Gov't Accountability Office, Observations on Wait Times for Voters on Election Day (2012) 17

U.S. Gov't Accountability Office, Voters with Disabilities: Challenges to Voting Accessibility (2013) 21

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations whose constituents, members, and clients face significant obstacles to voting. While voting is an easy and routine part of civic participation for some Americans, for many other eligible voters—including people with disabilities, older voters, working people, low-income voters, and the homeless—this is not the case. Because these voters face disparate obstacles to voting, they (or subgroups of them) do not vote as regularly and therefore are disproportionately harmed by the use of failure to vote as a reason for removal from the voter registration rolls. *Amici* represent these communities and therefore can best present to the Court the particular obstacles many such voters face each time they seek to cast a ballot.

Amicus curiae the National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The United States Congress established P&A and CAP agencies to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Amicus curiae Disability Rights Ohio is a nonprofit organization designated by the Ohio Governor as the protection and advocacy (P&A) system under federal law for people with disabilities in Ohio, *see* 42 U.S.C. § 15041 et seq. The mission of Disability Rights Ohio is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. As the P&A system for Ohio, Disability Rights Ohio engages in a wide range of advocacy to enforce the rights of people with disabilities, including removing barriers to participation in society. The right to vote is fundamental, and Disability Rights Ohio has a long history of working with people with disabilities to remove voting access barriers and enforcing their rights to participate in Ohio's electoral process. *See e.g.*, *Mooneyhan v. Husted*, Case No. 3:12-cv-379 (S.D. Ohio Nov. 16, 2012) (Decision and Entry Sustaining Plaintiff's Motion for a TRO) (enforcing the ADA rights of a person with mental illness hospitalized on election day to vote); *Ray v. Franklin Cnty. Bd. of Elections*, Case No. 2:08-cv-1086 (S.D. Ohio Nov. 17, 2008) (Opinion and Order Granting Plaintiff's Motion for TRO) (enforcing the ADA rights of a

person with mobility impairments to access a post-election ballot correction process to ensure her ballot was counted).

Amicus curiae AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. AARP and AARP Foundation are committed to encouraging voter registration and electoral participation and to reducing impediments thereto, such as rules triggering the purging of voters from registration lists based on their decision not to vote. AARP and AARP Foundation also support state procedures to prevent and detect voter fraud, but only means proportional to actual evidence of actual or attempted fraud. *Amici* are concerned that Ohio's Supplemental Process imposes excessive burdens on older voters, especially disabled, minority, low-income, and other vulnerable older voters, who have lived at and voted based on the same address for many years.

AARP has previously filed or joined amicus briefs challenging state laws restricting electoral participation in this Court, *see e.g.*, *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), and

in multiple federal and state appellate courts, *see, e.g.*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

Amicus curiae the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor unions that represent 12.5 million working men and women. Throughout its history, the AFL-CIO and its affiliated unions have encouraged union members and their families to engage in elections with the goal of electing representatives supportive of the interests of working families. As a result of these efforts, union households participate in elections in proportionately greater numbers than the general public. Even so, working people face multiple barriers to voting. The AFL-CIO and its affiliated unions have strived to reduce these barriers, and we have advocated to expand voter registration, education, and turn-out across the country. While many working people benefit from collective bargaining agreements that afford them time off to vote on Election Day without the fear of negative employment or economic consequence, not all collective bargaining agreements contain these protections, and many workers without collective bargaining agreements have no such protection. Given the obstacles to voting, the AFL-CIO believes states should not be permitted to compound these obstacles by removing people from the registration rolls solely based on the failure to vote.

Amicus Curiae Service Employees International Union (SEIU) is a labor union of two million men and women who work in healthcare, property service, and public service employment in the United States, Canada, and Puerto Rico. Many SEIU members live,

work, and vote in Ohio. SEIU engages in voter protection, education, and other election-related activities around the country, and SEIU and its locals have participated many times in election-related litigation as parties and as amici. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (SEIU locals as plaintiffs).

Amicus curiae the Democracy Initiative is a dynamic coalition of 60 diverse labor, environmental, civil rights, and good government groups building a demand for a reflective democracy by mobilizing 30 million members nationwide. The partner organizations and members work on a diverse range of progressive causes but each are committed to improving and protecting our democracy. As part of its mission, Democracy Initiative advocates for a democracy where all eligible voters are on the rolls, all voters can participate freely and fairly, and all votes are counted as cast in a modern and secure election system.

Amicus curiae the National Coalition for the Homeless is a national network of people who are currently experiencing or who have experienced homelessness, activists and advocates, community-based and faith-based service providers, and others committed to a single mission: To prevent and end homelessness while ensuring the immediate needs of those experiencing homelessness are met and their civil rights protected. Since 1992, the Coalition has been working to ensure that homeless and low-income voters have full and equitable access to voting mechanisms in their communities.

Amicus curiae the Columbus Coalition for the Homeless works to empower homeless persons to

achieve greater self-sufficiency and advocates on behalf of homeless persons and organizations that serve them. Founded in 1986 by a group of Columbus service providers, it helps member organizations provide direct services to the homeless and advocates to the government on their behalf. The Coalition is steadfastly committed to assuring the homeless maintain their voting rights both legally and practically.

Amicus curiae the Miami Valley Voter Protection Coalition is a non-partisan organization established in 2008. It includes individuals, community organizations, and civil rights and good government groups from Montgomery, Greene, and Clark counties in Ohio. It works to ensure that everyone who is eligible to vote is able to vote and that all those votes are counted. Members have testified on voting related legislation at the Ohio Statehouse. The Coalition works with Boards of Elections to ensure that their policies and procedures facilitate voting. Every two years, it recruits and trains volunteers who are available outside polling places on Election Day to advise voters of their rights, answer questions, and help solve problems.

SUMMARY OF ARGUMENT

This case presents the question of whether the National Voter Registration Act (NVRA) allows states to initiate the process for removing citizens from the registration rolls based solely on their failure to vote. Allowing states to disenfranchise voters on this basis would be contrary to the NVRA's general purpose of broadening participation of the electorate and the Act's specific goal of expanding access for historically disenfranchised groups. It would also unneces-

sarily and unjustifiably tread on the fundamental right to vote of many Americans already facing significant obstacles to political participation.

While for some Americans voting is an easy and routine part of civic participation, for large sectors of the American electorate—including people with disabilities, older persons, working and low-income people, and the homeless—this is not the case. Limited voting hours, erratic job schedules, child care needs, the closing of neighborhood polling places, inadequate or inaccessible transportation, and the costs associated with obtaining a photo identification, to name a few obstacles, mean that many eligible voters are unable to cast ballots on Election Day—despite registering where necessary, being motivated to vote in the particular election, and in some cases, even arriving at the correct polling place and waiting in line. Additionally, voters with disabilities—who also disproportionately experience poverty and its attendant obstacles to voting—face an election system in which less than one third of polling places are fully accessible. Finally, older voters, who are disproportionately represented among voters with disabilities, often face formidable barriers to voting and will face even greater barriers if they are struck from the rolls despite years living in the same place, sometimes for decades.

Because of these barriers, voters with disabilities and low-income voters vote at lower rates than the rest of the public, and working people and older voters participate at rates lower than they would absent those barriers. As a result, the harm of Ohio's challenged removal procedure (the "Supplemental Pro-

cess") falls disproportionately on those citizens for whom various features of the voting process already present significant obstacles to participation.

Amici—organizations comprised of and advocating for people with disabilities, older voters, working people, and low-income and homeless voters—submit this brief to present to the Court the severity, breadth, and impact of these obstacles on eligible voters. *Amici* submit that the overlapping barriers to voting noted above and described in greater detail below demonstrably affect the voting patterns of large sectors of the electorate.

The underlying assumption of the "Supplemental Process"—that a voter who has not voted in two years has likely moved—is fundamentally flawed. Nonvoting can often be explained by the remaining barriers to political participation for historically disenfranchised voters. By removing eligible voters facing these difficulties from the registration rolls, Ohio's process compounds these obstacles and imposes unnecessary burdens on access to the franchise.

Congress passed the NVRA with the express purpose of expanding participation of the electorate and the specific goal of lowering barriers to voting for historically disenfranchised groups. In passing the NVRA, Congress recognized that there are "many factors involved in the lack of public participation," some of which are "largely beyond the control of Congress" and that it could not, in one sweep, remove all of those barriers. H.R. Rep. No. 103-9, at 3 (1993). Yet, in an area under its control, "the difficulties encountered by eligible citizens in becoming reg-

istered to vote," it sought to reduce those obstacles to "the absolute minimum." *Id.*

A key element of the NVRA's scheme to lower registration barriers is its sections that seek to ensure that "a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." *Id.* at 18. By keeping eligible voters on the registration lists—even when they have not voted—the NVRA eliminates a major barrier to future political participation and "give[s] the greatest number of people an opportunity to participate." *Id.* at 3. Any other reading of the NVRA's list maintenance provisions would be at odds with its purposes and create constitutional concerns by erecting unnecessary and unjustified barriers to the exercise of the right to vote.

ARGUMENT

I. MANY VOTERS FACE SUBSTANTIAL OBSTACLES TO THE BALLOT BOX.

a. Working people and low-income voters navigate substantial obstacles to the ballot box.

For many Americans, exercising their right to vote requires overcoming a series of obstacles. Working people, and particularly low-wage workers, regularly navigate the confines of irregular work schedules, childcare needs, and unreliable transportation. However, these daily challenges can be cumulative and, within the limited hours available to vote on Election Day, can add up to prevent even the most motivated voter from casting a ballot.

First, working people and low-income voters must find a time to get to the polls outside of their work schedules.[2] However, low-wage workers are less likely to have flexible work schedules that allow them to vary their hours.[3] Indeed, many low-wage workers not only do not have flexibility to set their hours but also have unstable and/or on-call work schedules that make it difficult or impossible to plan other activities ahead.[4] Many voters also need to coordinate a time to vote that works not only with their work schedule but with their childcare schedule. Others—nearly seven million people across the country—work at two or more different jobs,[5] further exacerbating the obstacles to voting that employment and childcare schedules can create.

A voter who is unable to go to the polls outside of her working hours may be required to forgo pay in

---

[2] Ohio recently rolled back its early voting days and hours, eliminating a full week of early voting. David A. Graham, *Ohio's 'Golden Week' of Early Voting Is Dead, Again*, The Atlantic, Aug. 23, 2016, https://www.theatlantic.com/politics/archive/2016/08/ohio-voting-decision/497066/.

[3] Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in May 2004 (2005), https://www.bls.gov/news.release/pdf/flex.pdf.

[4] Econ. Pol'y Inst., Irregular Work Scheduling and Its Consequences 1 (2015), http://www.epi.org/files/pdf/82524.pdf (noting GSS survey data that 10% of the workforce has an irregular schedule and that lower income workers are more likely to have irregular work schedules).

[5] The Bureau of Labor Statistics reports that approximately 5% of workers in 2016 held more than one job. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2017), https://www.bls.gov/cps/cpsaat36.htm.

order to cast her ballot. Although some workers have voting leave protected by state law or collective bargaining agreements, many others do not, and federal law affords no such protection.[6]

Next, voters must locate their polling locations. Although some voters head to the same polling place year after year, many live in jurisdictions where there is less predictability—especially in the wake of this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In a study of 381 counties formerly covered by Section 5 of the Voting Rights Act, researchers found 868 polling place closures between 2012 and 2016.[7]

Studies have shown that changes in polling locations can have a statistically significant impact on turnout and attribute more than half of that impact to the informational cost of discovering the change and finding the new location in time to vote.[8] For homeless voters or voters without literacy skills or ready access to technology,[9] finding a changed poll-

---

[6] *See* AFL-CIO, Know Your Rights: State Laws on Employee Time Off to Vote (2016), https://aflcio.org/2016/11/5/know-your-rights-state-laws-employee-time-vote.

[7] Leadership Conference Educ. Fund, The Great Poll Closure 4 (2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf.

[8] *See* Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 1, 15 (2011).

[9] While the internet is an increasingly critical source of information in modern daily lives, there remains a significant digital divide in our country. Nearly half of households with

ing location can be particularly difficult.[10] Polling place changes significantly affect turnout even when the electorate is particularly motivated to vote.[11]

Once voters know where to go, they must find transportation to their polling place. Lack of access to reliable transportation disproportionately affects low-income Americans across many aspects of their lives and voting is no different. According to the American Community Survey, 9.1 percent of households have no vehicle available and over one third of households have only one vehicle for the entire

---

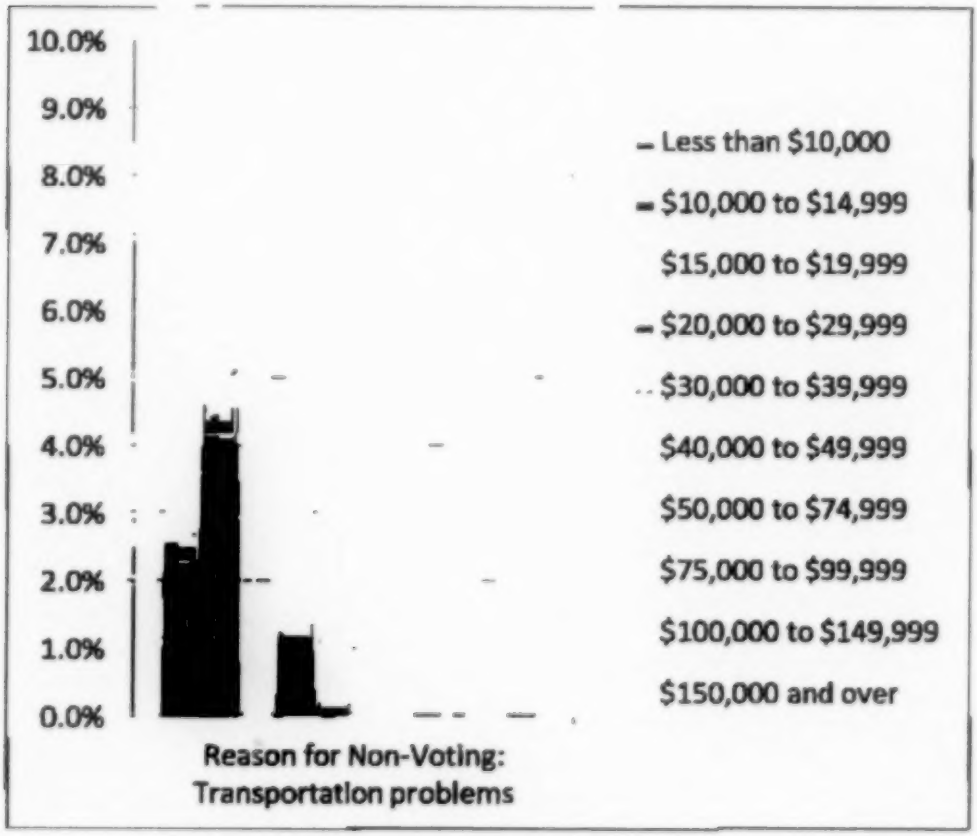
incomes under $30,000 do not have home internet service while 94% of households with incomes over $100,000 are connected. Approximately one third of households with incomes under $30,000 have no access to the internet. *See* Monica Anderson, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Ctr., Mar. 22, 2017, http://www.pewresearch.org/fact-tank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

[10] *See generally* Expert Report of Barry C. Burden 12 (Feb. 12, 2015), *N.C. State Conference of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016) (No. 1:13-cv-658), *available at* https://cdn.theatlantic.com/assets/media/files/41187c5df0d29acea8_q1m6bhevg.pdf ("Numerous studies have shown that educational attainment is often the single best predictor of whether an individual votes. This is largely because education lowers the 'costs' of voting by providing language skills, direct information about the electoral process, and a sense of confidence of efficacy that facilitate participation even when the rules are changed.").

[11] *See* John E. McNulty, Conor M. Dowling & Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 Pol. Analysis 435 (2009).

household.[12] In the Census Bureau's 2016 voting and registration survey, approximately eight percent of registered citizens earning less than $15,000 per year who did not vote cited transportation problems as the reason for not casting a ballot. Yet, transportation problems accounted for less than one percent of registered non-voters earning more than $40,000.[13]

Figure 1.[14]



---

[12] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Selected Housing Characteristics, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_SPT/DP04/0100000US.

[13] U.S. Census Bureau, Table 10. Reasons For Not Voting, By Selected Characteristics: November 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table10.xls

[14] *Id.*

These obstacles are, by their nature, cumulative and interdependent. For example, Ohio has early voting that might relieve some scheduling difficulties but each county only has one early voting center, posing greater transportation problems as voters have more distance to travel.[15]

Similarly, cutbacks to polling locations can affect not only voters' ability to find their polling place but also their ability to get transportation to those locations and the lines once they get there. After 2008, many Ohio counties consolidated precincts and polling places. Between 2008 and 2010, fourteen Ohio counties, including some of its most populous, reduced their precincts by more than fifteen percent.[16] As a result, for many Ohioans, what used to be a short walk to their polling place now requires a drive to a polling location that serves many more voters.

Assuming the ability to get to their polling location during voting hours, voters may face additional hurdles that require both time and financial resources to overcome. In some states, they must determine

---

[15] Expert Report of Vincent J. Roscigno, Racial Inequality, Racial Politics and the Implications of Recent Voting Restrictions in Ohio 18 (June 30, 2014), *NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (No. 2:14-cv-404), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio193.pdf.

[16] *New State Voting Laws III: Protecting the Right to Vote in America's Heartland: Hearing Before Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 112th Cong. 7 (2012) (Testimony of Carrie L. Davis, Exec. Dir., League of Women Voters of Ohio), https://www.judiciary.senate.gov/imo/media/doc/12-5-7DavisTestimony.pdf.

whether they have the required ID to vote and, if not, either obtain that ID or determine the correct processes in the jurisdiction for bypassing that requirement.[17] Not only do low-income voters disproportionately lack the types of photo ID that many states now require, and lack the resources to obtain them,[18] voter ID laws have created such confusion among the elec-

---

[17] *See* Nat'l Conference of State Legislatures, Voter Identification Requirements (2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx, for a description of the many different ID requirements and schemes now in place. For example, in Wisconsin, statutory ID is required to vote but, per court order, the DMV is required to issue a valid voting credential to any voter that starts the petition process. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 901 (W.D. Wis. 2016).

[18] *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc) (affirming District Court holding that Texas voter ID law violates Section 2 of the Voting Rights Act) ("The district court likewise concluded that SB 14 disproportionately impacts the poor, who are disproportionately minorities. It credited expert testimony that 21.4% of eligible voters earning less than $20,000 per year lack SB 14 ID, compared to only 2.6% of voters earning between $100,000 and $150,000 per year. Lower income respondents were also more likely to lack the underlying documents to get an EIC."); *Frank v. Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wis.) *rev'd on other grounds* 768 F.3d 744 (7th Cir. 2014) ("Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty. Individuals who live in poverty are less likely to drive or participate in other activities for which a photo ID may be required (such as banking, air travel, and international travel), and so they obtain fewer benefits from possession of a photo ID than do individuals who can afford to participate in these activities. In addition, . . . low-income individuals who would like to obtain an ID generally find it harder to do so than do those with greater resources.").

torate that many voters just give up and assume their inability to provide the right kind of identification.[19]

Finally, a voter who can take time away from work, arrange childcare, and transportation to the correct polling place, and has the required proof of identification in hand, may find that she has not allocated sufficient time to vote when she arrives to find a long line in front of her. In 2012, ten percent of voters waited in line for over half an hour to cast a ballot and over three million voters waited more than an hour.[20] Ohio is certainly not immune to these problems. In one survey of the 2004 election, researchers estimated that 174,000 voters in Ohio left their polling place without voting.[21]

And the burdens of long lines do not fall evenly on all voters. In fact, they often fall on those who face other obstacles to voting and who can least afford to spend the additional time waiting in line. Recent research shows that wait times in minority neighborhoods, which are also disproportionately

---

[19] Mark Jones, Renée Cross & Jim Granato, Univ. of Houston, Hobby School of Pub. Affairs, The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23 (2017), http://www.uh.edu/class/hobby/voterid2016/voterid2016.pdf (finding that non-voters cited lack of required ID as a reason for not voting, even where they actually had a qualifying ID).

[20] Stephen Pettigrew, *The Race Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 Pol. Sci. Q. 527, 527 (forthcoming 2017), http://www.stephenpettigrew.com/articles/pettigrew-2017-psq.pdf.

[21] Ari Berman, *Ohio GOP Resurrects Voter Suppression Efforts*, The Nation, Dec. 4, 2013, https://www.thenation.com/article/ohio-gop-resurrects-voter-suppression-efforts/.

poor, are about twice the length of wait times in mostly white neighborhoods and that "minority voters are three times as likely to wait longer than 30 minutes and six times as likely to wait more than 60."[22]

All of these increased obstacles to voting—polling place changes, long lines, transportation problems and costs, and scheduling difficulties due to irregular and inflexible work schedules that do not provide time off to vote—fall doubly hard on low-income voters because "they possess few of the resources needed to overcome those costs."[23] Empirical evidence shows that increases in costs to voting that might appear "equal" because they affect all voters actually have far greater impact on working people and low-income voters who have fewer spare resources available to absorb these costs.[24]

---

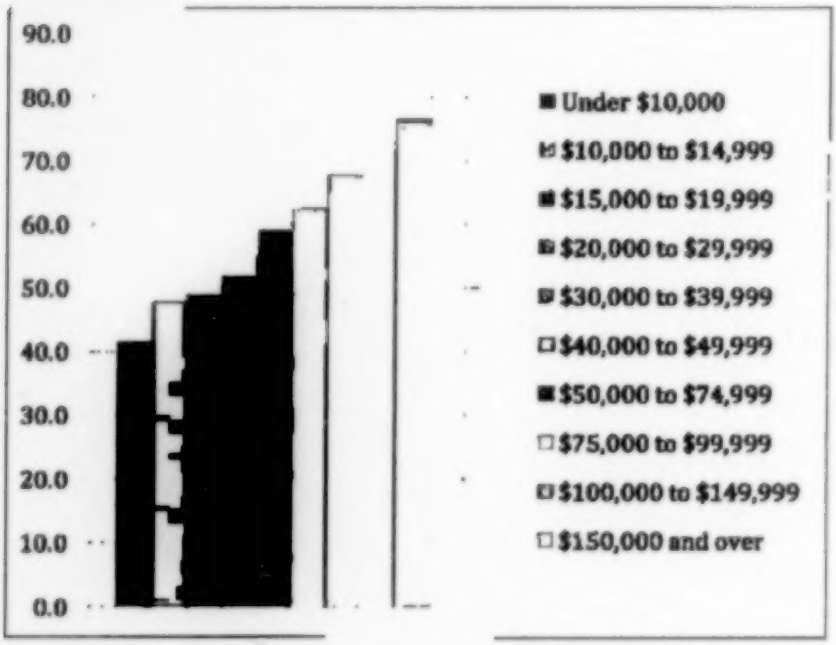
[22] Pettigrew, *supra* note 20, at 527. Other studies have found this racial gap in wait times as well. *See* Charles Stewart III & Stephen Ansolabehere, *Waiting to Vote*, 14 Election L.J. 47 (2013), https://dspace.mit.edu/openaccess-disseminate/1721.1/110798; U.S. Gov't Accountability Office, Observations on Wait Times for Voters on Election Day (2012), http://www.gao.gov/assets/670/666252.pdf.

[23] *See supra* note 11; *see also Veasey v. Perry*, 71 F. Supp. 3d 627, 665 (S.D. Tex. 2014) ("The poor also feel the burden most acutely. The concept is simple—a $20.00 bill is worth much more to a person struggling to make ends meet than to a person living in wealth.").

[24] *See* Roscigno, *supra* note 15, at 17 (citing Benjamin Highton, *Early Registration and Voter Turnout*, 59 J. Pol. 565 (1997) and Raymond E. Wolfinger, Benjamin Highton & Megan Mullin, *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 St. Pol. & Pol'y Q. 1 (2005)).

The natural result of the foregoing is dramatically lower turnout among low-income voters. Lower turnout among low-income voters has been an unfortunate but persistent feature of elections over time.[25] In 2016, less than forty-six percent of eligible adults with family incomes under $20,000 voted whereas over seventy-eight percent of eligible adults with family incomes $100,000 and over voted.[26] In fact, higher income correlates with a steady increase in likelihood of voting.

Figure 2.[27]



[25] Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote*, The Atlantic, Jan. 10, 2014, https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.

[26] U.S. Census Bureau, Table 7. Reported Voting and Registration of Family Members, by Age and Family Income: Nov. 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table07.xls.

[27] *Id.*

Over twelve percent of the citizen voting-age population, or over 27 million eligible voters, lives below the official poverty line.[28] These voters, and many other working people, face increased obstacles to voting and thus vote at a much lower rate than their more well-resourced peers.[29]

Political science literature talks about the effects of "costs" of voting in terms of the "calculus of voting," wherein individuals and groups calculate the costs and benefits of voting in deciding whether to cast a ballot; turnout will go up or down depending on those costs.[30] But for many workers and for many low-income and homeless voters, it may not really be a matter of choice in every election. There may be years when the obstacles stack up to prevent even motivated voters from getting to the polls. If Secretary Husted's purge procedures are permitted to remain in place, these voters will be removed from the registration rolls without any evidence of relocation

---

[28] U.S. Census Bureau, Electorate Profiles: Selected Characteristics of the Citizen, Voting-Age Population (2016), https://www2.census.gov/programs-surveys/demo/tables/voting/UnitedStates.xlsx.

[29] Because the poverty rate for Black and Latino citizens is double the poverty rate for White voters, these burdens also fall disproportionately on communities of color. U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Poverty Status in the Past 12 Months, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

[30] *See, e.g.*, Anthony Downs, An Economic Theory of Democracy (1957); John H. Aldrich, *Rational Choice and Turnout*, 37 Am. J. Pol. Sci. 246 (1993); M.E. Kropf, *Does Early Voting Change the Socio-Economic Composition of the Electorate?*, 4 Poverty & Pub. Pol'y 1 (2012).

and will be required to reregister. The NVRA—designed to lower barriers for precisely these voters—will be used to further shunt them away from the political process.

b. Disabled and older voters face substantial obstacles to the ballot box.

Many voters face additional, often cumulative, obstacles to voting because they have disabilities, a vulnerability also associated with being older. Some of these obstacles result from failures of our election system, while others are largely outside of the government's control. In either event, eligible voters often can't make it to the polls,[31] sometimes for several elections. They should not face additional obstacles when they are able to cast a ballot.

People with disabilities represent a major sector of the American electorate. Based on Census estimates, there are at least 35 million voting age people with disabilities—representing nearly one in six voting

---

[31] To be sure, many states have improved access to voting for senior citizens and people with disabilities through measures like vote by mail or no-fault absentee voting. Indeed, turnout among voters with disabilities is higher where these mechanisms are available. Lisa Schur, Meera Adya & Douglas Kruse, Research Alliance for Accessible Voting, Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections (2013), https://www.eac.gov/assets/1/1/Disability%20and%20voting%20survey%20report%20for%202012%20elections.pdf. However, these mechanisms for voting are neither ubiquitous nor without their own difficulties for voters with disabilities. About 10% of voters with disabilities that voted by mail reported difficulties voting and a majority of voters with disabilities report a preference for voting in person. *Id.*

age people—and that estimate is considered conservative and growing.[32]

But, despite legislative protections, our elections are still not well equipped to ensure equal access for these voters. A 2008 Government Accountability Office report found that over seventy percent of polling places were not fully accessible and twenty-seven percent of polling places had physical impediments and failed to offer curbside voting as an alternative.[33] The report also found that nearly one-half of voting systems inside polling places were not set up to accommodate users in wheelchairs.[34] Over thirty percent of voters with disabilities who did vote in 2012 reported one or more difficulties in voting.[35]

Obstacles for people with disabilities include inaccessible polling places with steps, stairs, or poor surfaces; lack of accessible transportation to polling places; long lines at polling places; and inaccessible voting systems that make it difficult for voters with

---

[32] *Id.* at 1 (noting that "a larger estimate of 46 million people with disabilities age 21 or older is based on a more expansive disability definition using the 2005 Survey of Income and Program Participation"); *see also* Lisa Schur & Douglas Kruse, Projecting the Number of Eligible Voters with Disabilities in the Nov. 2016 Elections (2016), https://smlr.rutgers.edu/sites/default/files/documents/faculty_staff_docs/Kruse%20and%20Schur_Disability%20electorate%20projections%202016_9-8-16.pdf.

[33] U.S. Gov't Accountability Office, Voters with Disabilities: Challenges to Voting Accessibility 11 (2013), https://www.gao.gov/assets/660/654099.pdf.

[34] *Id.*

[35] Schur, Adva & Kruse, *supra* note 31, at 6.

impairments—particularly visual ones—to read or mark their ballots privately and independently.

Twenty percent of nonvoters with disabilities (both registered and not) reported that the reason they did not vote was that they had "an illness or disability [that] made it too difficult to vote."[36] In another survey from 2008, almost one-fourth of disabled nonvoters reported transportation as a major factor in the reason they did not vote.[37]

People with disabilities consistently vote at rates lower than people without disabilities. In one study, the gaps in turnout based on disability in 2012, 2010, and 2008 were 5.7, 3.1, and 7.2 percent respectively.[38] But after controlling for age, education, and other characteristics, the gap was higher—about eight percentage points in each year.[39] In other words, if voters with disabilities voted at the same rate as otherwise similarly situated eligible voters without disabilities, there would be about 3 million more voters.[40]

---

[36] Ruth Igielnik, *A Political Profile of Disabled Americans*, Pew Research Ctr., Sept. 22, 2016, http://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans/.

[37] Thad E. Hall & R. Michael Alvarez, Information Tech. & Innovation Found., Defining the Barrier to Political Participation for Individuals with Disabilities (2012), http://elections.itif.org/wp-content/uploads/AVTI-001-Hall-Alvarez-2012.pdf.

[38] Schur, Adva & Kruse, *supra* note 31, at 4. In another study, Pew Research Center found a similar gap of 5 points in the 2014 midterm elections. Igielnik, *supra* note 36.

[39] Schur, Adva & Kruse, *supra* note 31, at 4.

[40] *Id.*

The turnout gap for people with disabilities exists even for registered voters with disabilities. While there is a small gap in registration rates—approximately two percent—more of the participation gap is caused by registered voters who do not turn out to vote, indicating that it is obstacles to the act of voting that drive much of the turnout gap for voters with disabilities.[41] Moreover, this gap is *not* caused by higher apathy or lack of interest in elections among people with disabilities. Indeed, a study by the Pew Research Center shows that individuals with disabilities were actually *more* interested in the 2014 midterm elections and its outcomes than people without disabilities.[42]

The burdens of accessing the right to vote can be particularly high for seniors with disabilities, who represent over one third of the senior population and over fifty percent of those over 75 years old.[43] Seniors, including seniors with disabilities, are very motivated members of the electorate but too often disability, illness, and transportation difficulties stand in the way of their casting ballots. While eighty-four percent of seniors with disabilities thought "it really matters who wins the election" in 2014, the gap in voting between seniors with and without disabilities was stark.[44] In 2014, sixty-nine percent of seniors with disabilities re-

---

[41] *Id.* at ii.

[42] Igielnik, *supra* note 36.

[43] U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Disability Characteristics, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S1810/0100043US.

[44] Igielnik, *supra* note 36.

ported voting compared to eighty-six percent of seniors without disabilities, a seventeen point gap.[45] About one third of registered non-voting seniors in the 2016 election reported that illness or disability was the reason they did not vote.[46]

Older voters face much greater transportation difficulty than their younger counterparts. In 2016, registered non-voters 65 years and older were more than twice as likely as any other age group to report transportation problems as their reason for not voting.[47]

And in recent years, older voters have faced new obstacles in light of new voter photo ID provisions. The Brennan Center estimates that eighteen percent of senior citizens—many of whom no longer drive[48]—do not have current government-issued photo ID.[49] And many seniors are particularly unlikely to have the necessary documentation to obtain new ID.

---

[45] *Id.*

[46] U.S. Census Bureau, Table 10, Reasons For Not Voting, By Selected Characteristics: Nov. 2016 (2017), https://www2.census.gov/programs-surveys/cps/tables/p20/580/table10.xls.

[47] *Id.*; *see also* Transportation for America, Aging in Place: Stuck Without Options (2011), http://t4america.org/docs/SeniorsMobilityCrisis.pdf (discussing the mobility crisis for this generation of seniors); AARP Pub. Pol'y Inst., How the Travel Patterns of Older Adults are Changing 4 (2011), https://assets.aarp.org/rgcenter/ppi/liv-com/fs218-transportation.pdf (reporting that 20.5% of individuals 65 years or older no longer drive).

[48] *Id.*

[49] Brennan Ctr. for Justice, Citizens Without Proof: A Survey of American's Possession of Documentary Proof of Citizenship and Photo Identification 3 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

For example, Floyd Carrier, a plaintiff in the Texas voter ID litigation pending in the Fifth Circuit, is an 86-year old disabled veteran with an expired driver's license because he no longer drives. He was born at home and does not have a birth certificate and thus has been unable to obtain the necessary ID to vote in person in Texas. In 2013, his son drove him to his regular polling location to vote curbside, as he had done for forty years. But because he did not have the proper type of photo ID, he was not permitted to vote.[50]

Mr. Carrier's case is not an isolated anecdote, but representative of the experience of many older voters. Voter ID cases in Pennsylvania and North Carolina have produced similar evidence.[51] Many older voters were born when births often went unrecorded and as a result do not have a birth certificate, the most commonly required documentation for driver's licenses and other forms of government photo ID.[52]

---

[50] *Veasey*, 71 F. Supp. 3d at 668, 670.

[51] *See, e.g.*, Compl. at 7–9, *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (2016) (No. 13-cv-658) (allegations of plaintiff Rosanell Eaton, a 92-year-old African American woman who was born at home and whose certified birth certificate does not match the name on her driver's license or the name on her voter registration card); Verified Pet. for Review at 7, 9, 11, *Applewhite v. Commonwealth*, No. 330 MD 2012 (Commw. Ct. Pa. Oct. 2, 2012) (allegations of African-American Pennsylvania resident plaintiffs Wilola Shinholster Lee, Gloria Cuttino, and Dorothy Barksdale, whose states of birth—Georgia, South Carolina, and Virginia, respectively—have no record of their birth).

[52] *See* Sam Shapiro, *Development of Birth Registration and Birth Statistics in the U.S.*, 4 Population Stud. 86, 97 Fig. 2 (1950) (4.8% of Ohio births in 1940 unrecorded).

This problem is especially acute for older voters of color, a disproportionate share of whom were born outside hospitals.[53]

Obstacles for older voters, voters with disabilities, and especially for older disabled persons are further compounded when those individuals are *also* living in poverty and therefore face the resource obstacles described above. Unfortunately, these interdependent struggles are far from unusual. People with disabilities are twice as likely to live in poverty as people without disabilities.[54] Similarly, based on the supplemental poverty measure, which takes into account healthcare costs, the Census Bureau estimates that nearly fifteen percent of senior citizens are living in poverty.[55]

---

[53] An estimated 23% of U.S. births outside of hospitals in 1940 went unregistered; "about three in four of the non-white infants [that year] were born at home." *Id.* at 99. The same year 6.3% of non-white births and 4.7% of white births in Ohio went unrecorded. Joseph Schachter & Sam Shapiro, *Birth Registration Completeness, U.S., 1950*, 67 Pub. Health Reps. 513, 522 Tbl. 4 (1952).

[54] Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NPR, July 23, 2015, 3:38 PM, http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law.

[55] U.S. Census Bureau, The Supplemental Poverty Measure: 2016 (2017), https://www2.census.gov/programs-surveys/demo/tables/p60/261/ErratumTable.xlsx.

II. OHIO'S REMOVAL PROCEDURE IMPOSES SUBSTANTIAL BURDENS ON REGISTERED VOTERS WITHOUT EVIDENCE OF ANY CHANGE IN ELIGIBILITY STATUS.

At the heart of this case is an incorrect presumption, most plainly stated by *amicus curiae* Buckeye Institute: "[if] a voter has not voted for several years and has failed to respond to confirmation notices, a presumption arises that he or she no longer meets the state's residency qualification." Brief of *Amicus Curiae* The Buckeye Institute in Support of Petitioner at 15. Given the foregoing data regarding the significant obstacles faced by large sectors of the electorate, this presumption is unreasonable and reliance on it to impose additional burdens on voters raises serious constitutional concerns.

As described above, many Americans face numerous overlapping and compounding obstacles to voting—some exacerbated by the state, others external—that can explain failure to vote for several elections. For that reason, it is discouraging but not surprising that analysis of Ohio's "Supplemental Process" has shown that it disproportionately impacts voters in poor neighborhoods.[56]

But, as the NVRA clearly states, nonvoting does not indicate ineligibility. A voter with a chronic dis-

---

[56] *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016, https://www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D.

ease who has missed several elections due to bouts of illness should not arrive at the polls to find herself removed from the registration rolls and unable to vote. Likewise, an impoverished senior citizen who has not voted for several cycles due to lack of transportation should not find himself unable to vote if a new neighbor offers to bring him to the polls.

Petitioner Husted argues that the challenged process does not remove voters solely for failing to vote because Ohio sends these registered voters notices and does not remove them *if* they affirmatively respond to that notice. *See* Petitioner's Merits Brief. Beyond the reasons why this is a flawed reading of the statute as a whole, *see* Respondents' Merits Brief, this reading of the statute would undermine the clearly stated goals of the NVRA. In both the House and Senate reports, the committees principally responsible for crafting the NVRA explained that the removal provisions were intended to prevent states from removing "any person from the official list because of failure to vote" or "solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15 (1993); S. Rep. No. 103-6, at 31 (1993).

Congress barred removal from registration based on non-voting, with or without an accompanying non-response, for good reason. This bar directly serves Congress's goal of reducing registration barriers to an "absolute minimum" and fulfills the statute's purpose to "promote the exercise of [the fundamental] right [to vote]." H.R. Rep. No. 103-9, at 3. For many of the most vulnerable communities that the NVRA is designed to protect, providing a single notice of possible removal does not meaningfully miti-

gate what is still the equivalent of removal for failure to vote.

Moreover, the notice procedure is likely to impose additional burdens on many of the voters already facing obstacles to vote. For this reason, while it is a perfectly reasonable mechanism for *confirming* a change in residence, it is too flawed a mechanism for *assuming* one. A few of the attendant problems with a notice procedure based on failure to vote are described below.

First, homeless voters or voters without traditional residential addresses have the same right to vote as all other citizens. *See Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."). Yet voters without traditional residential addresses will not receive any mailed notice from the Secretary of State. In fact, Ohio allows homeless voters to use intersections and other non-traditional addresses as their residences for purposes of registration.[57] Therefore, for homeless voters, the Secretary of State's program cannot be characterized as anything other than a re-registration requirement for non-voting, in violation of the NVRA.

---

[57] "In Ohio, a mailing address is required if it exists. If not, a geographical description is required." Nat'l Coal. for the Homeless, "You Don't Need a Home to Vote," Voting Rights: Registration Manual 23 (2016), http://nationalhomeless.org/wp-content/uploads/2016/04/Voting-Manual.pdf (listing the various laws for all fifty states and the District of Columbia).

Second, the notice will also be largely ineffective for voters with low literacy skills. According to the 2003 National Assessment of Adult Literacy, twelve percent of adults in the United States have below basic document literacy (defined as "the knowledge and skills needed to perform document tasks").[58] The rate of low literacy skills among voters with disabilities is higher than among their peers without disabilities. The gap in reading proficiency between students with and without disabilities is over twenty percentage points due, at least in part, to gaps in educational opportunities.[59] Similar gaps in reading proficiency also persist for low-income students.[60]

Third, printed mail notices will be similarly ineffective for many other disabled or older voters. They are not accessible for blind individuals. They are less likely to reach individuals who often have extended stays outside their permanent residences in hospitals or other health care facilities. And for those voters permanently residing in group residences such as nursing homes and health care facilities, delivery of the notice depends on the effectiveness and efficiency of their facilities' mail delivery systems.

---

[58] Nat'l Ctr. For Educ. Statistics, Assessment of Adult Literacy, A First Look at the Literacy of America's Adults in the 21st Century (2006), https://nces.ed.gov/NAAL/PDF/2006470.PDF. An example of document literacy is the ability to fill out a certified mail receipt based on given information. *Id.*

[59] Nat'l Educ. Ass'n, Understanding the Gaps: Who Are We Leaving Behind—And How Far 3 (2015) https://www.nea.org/assets/docs/18021-Closing_Achve_Gap_backgrndr_7-FINAL.pdf.

[60] *Id.*

Finally, for all other voters, the requirement to respond to a notice—absent any evidence of their ineligibility—represents an additional unjustified bureaucratic hurdle to voting. While responding to a prepaid return card is designed to be relatively easy, the ease or difficulty of completing this task depends on the above factors as well as a voter's education level and resources. Social science research shows that scarcity of resources—of time, opportunities, or money—can have significant impact on an individual's attention to anything other than the present scarcity.[61] In other words, low-income and resource-strained voters may be likely to overlook a single notice regarding a faraway election while they are focused on everyday difficulties. Since Ohio has no reliable reason to believe that these voters have relocated, requiring

---

[61] *See, e.g.*, Anuj Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 Sci. 682, 682 (2012). The authors explain various experiments demonstrating that:

> Having less elicits greater focus. . . . This view is not bound to the specific circumstances of poverty, nor does it make assumptions about the dispositions of the poor. This mindset stems from the most fundamental feature of poverty: having less. And this hypothesis is about scarcity more generally, not just poverty. Indeed, just as expenses capture the attention of the poor, researchers have found that people who are hungry and thirsty focus more on food- and drink-related cues . . . .
>
> Because scarcity elicits greater engagement in some problems, it leads to neglect of others. While focusing on the groceries from week to week, we might neglect next month's rent.

Id.

voters to clear this hurdle in order to vote is both unnecessary and unjustifiably burdensome.

The result of the foregoing is unsurprising. Ohio's "Supplemental Process" leads to the disenfranchisement of thousands of eligible voters. In November 2016, if not for the relief ordered by the district court, 7,515 eligible Ohioans would have been disenfranchised. *See* Respondents' Brief at 20.

III. INITIATING THE REMOVAL PROCESS BASED ON NON-VOTING UNDERMINES THE NVRA'S EXPRESS PURPOSES AND RAISES CONSTITUTIONAL CONCERNS.

Older Americans, low-income and homeless Americans, and Americans with disabilities represent a diverse and substantial sector of the electorate. They all face substantial obstacles to voting that may lead to their absence from the polls for several cycles regardless of their desire and eligibility to vote. Forcing these voters to follow additional bureaucratic steps to stay on or return to the voter registration rolls is directly contrary to the NVRA's goal of lowering barriers for precisely these voters. Moreover, Ohio's imposition of bureaucratic hurdles and/or re-registration on these voters based only on their non-voting raises grave constitutional concerns. The canon of constitutional avoidance counsels against interpreting the NVRA to allow such a system.

Constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v.*

Martinez, 543 U.S. 371, 381 (2005). Its application is particularly apt in this case, where Congress was clear that its intent was to preserve and promote the "fundamental right" to vote. 52 U.S.C. § 20501. Thus, where two interpretations of a provision are available, the Court can easily assume that Congress' intent was not to allow a scheme that would unjustifiably burden the right to vote.

The right to vote is a "fundamental political right . . . preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (internal quotation marks and citations omitted). As such, when confronting burdens on the right to vote, courts must balance the burden on the right to vote against the state's justifications and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Here, the burden on the right to vote is substantial. Apropos of nothing other than nonvoting, Ohio places bureaucratic hurdles between eligible voters and continued political participation. As discussed above, it is likely that many *eligible* voters—including voters without traditional addresses and with low literacy skills—will not respond to the notice and therefore will be required to re-register in order to vote. Many voters will not be aware that they were struck from the rolls and when they appear to vote on Election Day will not be able to vote.[62] The consequence

---

[62] The Voting Technology Project at CalTech/MIT estimates that millions of votes are already lost nationwide due to registration problems that voters discover on Election Day. CalTech/MIT Voting Tech. Project, Voting: What Has Changed, What

of Ohio's purge program for these voters will be the ultimate burden on the right to vote: complete disenfranchisement for that election.

It is well recognized that the duty to register is the primary obstacle to voting. Indeed, the NVRA was motivated by the well-founded belief that increasing access to registration would increase overall participation. H.R. Rep. No. 103-9, at 3 ("Public opinion polls, along with individual testimony . . . , indicate that failure to become registered is the primary reason given by eligible citizens for not voting. It is generally accepted that over 80 percent of those citizens who are registered vote in Presidential elections. . . . Expanding the rolls of the eligible citizens who are registered is no guarantee that the total number of voters will increase, but it is one positive action Congress can take to give the greatest number or people an opportunity to participate.")

Registration problems are routinely among the top problems reported on Election Day to election protection hotlines.[63] And same-day registration consis-

---

Hasn't, & What Needs Improvement 27 (2012), vote.caltech.edu/documents/146/Voting_Technology_Report_1_14_2013.pdf. Allowing states to purge voters from the rolls without any basis for believing they are no longer eligible residents will certainly add to this number.

[63] Lawyers' Comm. for Civil Rights Under Law, 2010 Election Protection Report 4 (2010), https://www.866ourvote.org/newsroom/publications/body/Election-Protection-2010-Report.pdf (noting registration problems as a persistent problem in 2004, 2006, 2008, and 2010) (registration problems were the most common type of problem reported in 2004 and 2008); Lawyers' Comm. for Civil Rights Under Law, 2014 Election Protection

tently increases turnout in states—unlike Ohio—that have it,[64] indicating that many voters stay home on Election Day simply because they are not registered.

As discussed above, the burdens of re-registration will fall especially hard on those voters that already face substantial obstacles to voting. For those voters without easy access to technology (of which there are many),[65] re-registration may require a separate trip to an agency that can assist with registration. It will pose a particular challenge for voters with low-literacy skills and homeless voters who have to navigate a maze of laws regarding what address they can use to register.[66] Moreover, several states have passed laws in recent years increasing the difficulty of registration.[67] Finally, voter registration is particularly

---

Report 4 (2015), https://www.866ourvote.org/newsroom/publications/body/2014-EP-Full-EP-Report-Print-Version.pdf (reporting 24.5% of calls were concerning voter registration).

[64] *See, e.g.*, Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 Soc. Sci. Q. 171, 178 (2001); Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 Am. Pol. Q. 74, 84 (1994); Stephen Knack, *Election Day Registration: The Second Wave*, 20 Am. Pol. Q. 65, 76 (2001).

[65] *See* Anderson, *supra* note 9.

[66] *See* Nat'l Coal. for the Homeless, *supra* note 57 (listing the various laws for all fifty states and the District of Columbia).

[67] *See, e.g, League of Women Voters v. Newby*, 838 F.3d 1, 4 (D.C. Cir. 2016) (challenging the Election Assistance Commission Executive Director's decision to allow three states with documentary proof of citizenship requirements for registration to enforce those requirements on the federal form).

hard for voters with disabilities because of the inaccessibility of many states' voter registration sites. In a recent study, the ACLU found that only *one* state website had an accessible online voter registration form for people who use screen readers (technology that translates speech to text).[68]

Weighed against these significant burdens is the state's asserted interest in ensuring that its voter registration rolls are current and accurate. While that is certainly an important goal, courts must consider "the extent to which [that interest] make[s] it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

Where a jurisdiction's NVRA notice procedure is initiated by change-of-address information supplied by the National Change of Address (NCOA) program, as in the "safe harbor" procedure, or where a jurisdiction has another reason to believe a voter may no longer be eligible (such as a death certificate matching the voter's identity), the burdens the removal process places on the right to vote described above are reasonable because the process furthers the state's purpose of maintaining accurate voter registration rolls.

But here, where Ohio seeks to purge voters without *any* credible evidence that they are no longer eligible to vote, Ohio has not and cannot show that this pro-

---

[68] ACLU, Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities (2015), https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities.

cess is "necessary" to achieving that goal.[60] To the contrary, it undermines that goal by removing thousands of eligible voters from the registration rolls. That is precisely why forty-three states do not follow the Ohio model but instead have developed other criteria, actually related to proof of a residence change, for maintaining their rolls. *See* Respondents' Brief at 14-16.

In sum, the Ohio "Supplemental Process" imposes substantial burdens on countless voters and disproportionately burdens low-income and other vulnerable voters, compounding the many other obstacles to voting they already face. It does so absent evidence that these voters' eligibility has changed and therefore does not further the state goal of accurate list maintenance. Such a program not only contravenes the NVRA's language and undermines its goals but also is of doubtful constitutional legitimacy. The Court should not allow it to continue.

---

[60] The NCOA safe harbor procedure provides an alternative means of achieving this goal. The *amicus* brief on behalf of the National Conference of State Legislatures provides examples of many other state procedures for keeping registration rolls current that do not involve placing voters into a removal process solely based on failure to vote. *Amicus* Brief of Nat'l Conference of State Legislatures at 7.

CONCLUSION

For the foregoing reasons and those stated in Respondents' brief, *amici* urge this Court to affirm the ruling below.

September 22, 2017

Respectfully Submitted,

PAUL M. SMITH
Counsel of Record
DANIELLE LANG*
CAMPAIGN LEGAL CENTER
1411 K Street, NW, Suite 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegalcenter.org

** Admitted in New York and California; practice limited to U.S. courts and federal agencies.*

Counsel for *Amici Curiae*

WILLIAM ALVARADO RIVERA
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-6400
warivera@aarp.org
dkohrman@aarp.org
Counsel for *Amici Curiae*
AARP and AARP Foundation

RENATA E. B. STRAUSE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 16th Street, NW
Washington, DC 20006
rstrause@aflcio.org
Counsel for *Amicus Curiae*
AFL-CIO

ELLIS JACOBS
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
130 West Second St., Ste. 700
East Dayton, OH 45402
(937) 535-4419
ejacobs@ablelaw.org
Counsel for *Amicus Curiae*
Miami Valley Voter Protection Coalition

NICOLE G. BERNER
CLAIRE PRESTEL
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Avenue, NW
Washington, DC 20036
nicole.berner@seiu.org
claire.prestel@seiu.org
Counsel for *Amicus Curiae*
Service Employees International Union